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## Planning for Legality

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# PLANNING FOR LEGALITY

*Jeremy Waldron\**

LEGALITY. By *Scott Shapiro*. Cambridge: Harvard University Press, 2010. Pp. 472. \$39.95.

## I. COMPARISONS

What is law like? What can we compare it with in order to illuminate its character and suggest answers to some of the perennial questions of jurisprudence?

Natural lawyers compare laws to moral propositions. A human law is an attempt by someone who has responsibility for a human community to replicate, publicize, and enforce a proposition of objective morality such as "Killing is wrong." Law is like moral reasoning, say the natural lawyers, and laws should be regarded as principles of right reason (principles that reason dictates as answers to the moral questions that need to be addressed in human society).<sup>1</sup> However, in recent times legal philosophers have looked for illumination in the domain of social fact rather than in the realm of value. Law is like power, they have suggested, or like certain facts about the existence and exercise of power. So, for example, John Austin, writing in the first half of the nineteenth century, said that laws were like commands. A command is the expression of a wish coupled with the threat of a sanction, and a law expresses the wish of a sovereign along with a threat (for the event of noncompliance) that the sovereign's ascendancy in a society makes credible.<sup>2</sup> Justice Holmes offered a different comparison: a law, he said, is like a prediction of what courts will do in a certain event.<sup>3</sup> The law prescribing fifty-five miles per hour as the speed limit for the state of New York is a prediction that the courts will impose fines on those who are caught driving faster than that. So jurisprudence is like social science: it takes a series of predictions about what powerful people will do and it tests and organizes them.

H.L.A. Hart, writing in the middle of the twentieth century, used a different comparison from social science. He argued that laws are like social

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1. See, e.g., THOMAS AQUINAS, *Summa Theologica*, in *AQUINAS: SELECTED POLITICAL WRITINGS* 103, 121 (A.P. D'Entrèves ed., J.G. Dawson trans., 1959).

2. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 21, 166 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832).

3. Oliver Wendell Holmes, Justice, Supreme Judicial Court of Mass., *The Path of the Law*, Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), reprinted in 79 B.U. L. REV. 699, 699 (1998).

practices.<sup>4</sup> In the United States there is a practice of removing one's cap at a baseball game when the national anthem is played. There is no law to this effect, but it is something one does; those who do it do so because everyone does it and they think they ought to do it, too; and they frown upon and sometimes remonstrate with those who fail to remove their caps when *The Star-Spangled Banner* is played.<sup>5</sup> Laws, says Hart, are like this—particularly the most fundamental laws of a legal system.<sup>6</sup> The rule that courts follow precedent, for example, is not commanded by a sovereign; and it is not a prediction that judges who fail to follow precedent will be sanctioned. It is just a practice among the higher judiciary that has become established and entrenched. It is complicated, no doubt, and it is by no means an absolute rule. But it exists as a law (in a given system of laws) because it is practiced by the officials of the system.

Other positivists invoke more abstract and sophisticated comparisons. Hans Kelsen said that laws are like norms. He did not mean moral norms; he meant that laws were like simple normative statements such as "Do this!" or "Do that!" or "This is to be done."<sup>7</sup> And this view is very common among positivists today.<sup>8</sup> They compare laws with prescriptions that purport to guide action. Someone might say "Don't drink" as a way of directing people away from alcohol consumption: his saying that indicates a course of action and prescribes its avoidance. For a while, during the period of Prohibition in the 1920s, we had laws that were exactly like this prescription: they directed us away from the use of alcohol. But then in 1933 we abandoned this norm (at least for adults), though the law continued to direct minors not to consume alcohol.<sup>9</sup> Laws are like that; they are norms or prescriptions that come and go.

To say that law is like X does not preclude it from also being like Y. Some jurists have backed more than one of these horses. William Blackstone tried to combine the command theory with the moral or natural law theory. Law is both like a command and like a moral proposition: his definition of law was "a rule of civil conduct prescribed by the supreme power in a state commanding what is right and prohibiting what is wrong."<sup>10</sup> Jeremy Bentham derided this sort of eclecticism as unrigorous and potentially con-

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4. H.L.A. HART, *THE CONCEPT OF LAW* 254–59 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994).

5. *See id.* at 55–58.

6. *See id.* at 109–10.

7. HANS KELSEN, *PURE THEORY OF LAW* 3–15, 70 (Max Knight trans., California Library reprint ed. 1989).

8. *See, e.g.*, JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 206–07 (2001); JOSEPH RAZ, *The Rule of Law and its Virtue*, in *THE AUTHORITY OF LAW* 210, 213–14 (1979).

9. I owe the example to Scott J. Shapiro, *On Hart's Way Out*, in *HART'S POSTSCRIPT* 149, 153 (Jules Coleman ed., 2001).

10. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*44 (internal quotation marks omitted).

tradictory.<sup>11</sup> But sometimes more than one comparison *is* appropriate either because law has many different aspects or because there are different kinds and levels of laws. H.L.A. Hart famously distinguished between the primary rules and the secondary rules of a legal system.<sup>12</sup> As I have indicated, his comparison of law with social practices works best for some of the most fundamental secondary rules, like the rule of recognition. In a system of customary law it might also work for primary rules; these too might be best understood as social practices. But in a system of enacted law, it is better to understand primary rules as norms or prescriptions directed by lawmakers to persons who are expected to comply with them. Their existence conditions may include facts about compliance; but the comparison between ordinary primary rules and social practices is for the most part unilluminating for modern legal systems.<sup>13</sup> So we describe primary rules as norms rather than as practices. But sometimes we use both analogies to illuminate a given law. So, for example, in Hart's account, we say that secondary rules are illuminated by the comparison with social practices but that they are also illuminated by the comparison with norms. This is because the practices Hart has in mind are not just convergences of behavior, but convergences of behavior that has an internal aspect oriented to the guidance of the conduct of those who participate in the practice. Hart's secondary rules are like norms *and* they are like social practices.

## II. THE PLANNING THEORY

Scott Shapiro, who teaches jurisprudence and philosophy at Yale University, has written a book—rich and vibrant with jurisprudential ambition—suggesting a new comparison. Laws are like plans, he says. “Legal activity is an activity of social planning” (p. 195), and the laws that result from social planning are themselves just like plans that have been adopted in our community. Like the plans that a bunch of people may make among themselves to coordinate an activity like cooking dinner together or going on a trip, social plans operate to guide and coordinate the activities of a number of people acting together but also in partial independence of one another to secure a common objective. “The main idea behind the Planning Theory of Law,” says Shapiro, “is that the exercise of legal authority . . . is an activity of social planning. Legal institutions plan for the communities over whom they claim authority, both by telling their members what they may or may not do and by authorizing some of these members to plan for others” (p. 195).

In elaborating his Planning Theory, Shapiro does not reject the conventional view of law as norms (that is, laws as prescriptions that purport to

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11. See JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES 60–73 (Charles Warren Everett ed., 1928).

12. The distinction is between primary rules, governing conduct, and secondary rules, which regulate the way in which laws are made, recognized, interpreted, and applied.

13. See HART, *supra* note 4, at 110–17.

guide action). But his position is that the normative view is incomplete: "[L]egal activity is more than simply the activity of formulating, adopting, repudiating, affecting, and applying norms for members of the community" (p. 195). To plan is to adopt, subscribe to, and comply with a set of norms that makes sense in light of a common purpose, hopefully a set of norms that meshes purposefully with the norms adopted by others involved in that project. Sally is to make sure the car is filled with gas; she is guided by the norm that says, "Sally, make sure the car is filled with gas." And Harry is to bring his luggage at a certain time to a street corner near the University of Chicago; he is guided by a norm that says, "Harry, bring your luggage to the corner at 10 a.m." The two norms intermesh, and being guided in these complementary ways, Harry and Sally can carry through on their plan to drive together from Chicago to New York City.<sup>14</sup> But while all plans involve norms, "not all norms are plans" (p. 128). The norms of logic, for example, are not plans, according to Shapiro (p. 128); they are just norms. And the same, Shapiro says, is true of moral principles (p. 128) like "Thou shalt not kill." All they do is direct us away from killing. But laws—which Shapiro thinks are mostly *not* illuminated by any comparison with moral principles—are plans. The Sherman Act, for example, is a plan for running a market economy free of collusive and uncompetitive distortions; it requires all sorts of individuals, firms, and officials to follow various norms that are supposed to mesh together as subplans in one vast, complex, planned enterprise designed to avoid monopolies, restraints on trade, and unfair methods of competition (pp. 195–97).

In pursuing this theme, Shapiro is drawing on the work of Michael Bratman, a philosopher at Stanford University, who analyzes the structure of planning and the intentionality of joint action.<sup>15</sup> When one person plans out an activity for himself, he breaks a complex enterprise down into its component parts, so that he can see how they fit together, what order they need to be pursued in, and what each component requires so far as the other components are concerned. To cook dinner, I must buy food, and so my trip to the supermarket must be oriented to the ingredients of the recipe I have in mind, and the timing of my preheating the oven must be determined by how hot the oven needs to be for the dish I want to cook and how long it will take me to get to the supermarket and back, which depends on which supermarket I choose to go to, which depends in turn on what I need to buy.<sup>16</sup> That is one-person planning.

When two people engage in an action like cooking dinner together, the intentionality is more complicated. We cannot say that each of them intends to cook dinner, because the intentional actions of each may relate only to a

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14. See the opening scene of *WHEN HARRY MET SALLY . . .* (Castle Rock Entertainment et al. 1989).

15. See, e.g., MICHAEL E. BRATMAN, *INTENTION, PLANS AND PRACTICAL REASON* (1987); MICHAEL E. BRATMAN, *Shared Cooperative Activity*, in *FACES OF INTENTION* 93 (1999); Michael E. Bratman, *Shared Intention in FACES OF INTENTION*, *supra*, at 109.

16. I have adapted this example from pp. 121–22.

part of the dinner-cooking enterprise. I intend to marinate and grill the meat, while you intend to prepare the vegetables. But neither is it simply a case of my having the meat-intention and your having the vegetable-intention (as though we were operating independently of one another). What is important is that we both orient our particular intentions (meat or vegetables) to the overall plan that we share (dinner), to which we have a common intentional attitude; and we organize our particular assignments—our subplans, if you like—to mesh together in a way that means that dinner ends up being cooked by the two of us. The behavior of each person is guided by the part of the subplan that applies to him, but at the same time each person monitors how his part of the plan and the other person's part of the plan are going and adjusts his behavior accordingly so that mishaps and unforeseen complications are taken properly into account as things proceed.

As I have said, Shapiro thinks that all this casts a great deal of light on law and the problems of jurisprudence. “[L]egal activity also seeks to accomplish the same basic goals that ordinary, garden-variety planning does, namely, to guide, organize, and monitor the behavior of individuals and groups” (p. 200). Of course, the groups involved in the making and carrying forward of legal plans are very large; Shapiro talks of “massively shared agency” (p. 143). And it may be much harder to create and sustain a sense of common purpose among millions of opinionated individuals in any given field of endeavor. Part of what is involved in social planning is identifying potential conflicts as well as complexities and difficulties, and setting up ways of dealing with these before things go dangerously awry (p. 133). To accommodate these vicissitudes, planning for activity among millions may require hierarchies among those whose activities are to be coordinated, so that not everyone is involved directly in the specification of the overall purpose and not everyone is involved in dividing the tasks up and assigning them throughout the group. Shapiro's discussion of this “dense horizontal and vertical division of labor” (p. 149), and his account of how people can be involved in plans from which they are in a sense alienated, is one of the best parts of the book:

Because alienated participants are not usually committed to the success of the joint activity, it is likely that they will have to be given detailed guidance on how to act. It may also be necessary to create hierarchical structures so that conflicts are resolved and performance monitored. Finally, those in supervisory positions might need to be authorized to enforce the group's policies through the imposition of sanctions. Plans, we can see, are powerful tools for managing the distrust generated by alienation. For the task of institutional design in such circumstances is to create a practice that is *so thick with plans and adopters, affecters, appliers, and enforcers of plans that alienated participants end up acting in the same way as non-alienated ones*. The fact that activities can often be structured so that participants intentionally achieve goals that are not *their* goals accounts for the pervasiveness of massively shared agency in the world around us. (p. 150)

Most importantly, besides this high degree of complex organization, legal planning involves planning to plan. It involves setting up all-purpose planning arrangements (which are themselves plans) that regulate the process of social planning. The legislature, as an institution, embodies a plan—not about anything in particular, but about planning in general. Having such an institution is tremendously valuable as we face the need to develop plans of all different kinds in different sets of social circumstances. A new form of terrorism emerges on 9/11 and we urgently need a plan for responding to it; that plan needs to be developed and followed through among millions of people who have different preferences and priorities as to how we should approach the problem. Navigating this contentious issue will be bad enough, but things will be even worse if we have to start from scratch in the planning process, determining amid the havoc that the terrorists have created what procedures are to be used in trying to come up with a response. Fortunately, we already have an institution and a set of procedures designed not necessarily with terrorism in mind, but with planning in mind. We have the U.S. Congress and we can use the procedures it embodies to formulate and enact the USA PATRIOT Act,<sup>17</sup> even though those procedures have never been used for planning of exactly this kind before. They have been used for antitrust planning and social security and the promotion of civil rights, and they are open and adaptable enough to be used to accommodate the making of this new kind of plan that we urgently need.

And something like this is true of the other institutions of the legal system as well. Courts are all-purpose mechanisms for protecting the integrity of and settling disputes about the plans we already have and for making authoritative determinations about what is required of whom under their auspices. They are useful, too, for elaborating and extending existing plans to new circumstances, as well as for developing new plans in an incremental sort of way. As Shapiro put it in an earlier piece, legal institutions are or embody large-scale plans oriented to the very abstract task of the creation and maintenance of a unified system of rules.<sup>18</sup>

### III. ARE ALL LAWS PLANS?

The exact structure of Shapiro's thesis is not always clear. He wants to say that "legal activity is best understood as social planning" (p. 120), and he means, at least in the first instance, activity like legislation and the development of lines of doctrine. Shapiro pursues an interesting distinction between top-down planning (where a bunch of people begin with an overall goal or the specification of complex action that they want to achieve, and deliberately and methodically carve it up into its component parts, assigning each part to some person or agency), which is what legislation is like, and bottom-up planning (where the overall plan is constructed on the wing as it

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17. USA PATRIOT ACT of 2001, Pub. L. 107-56, 115 Stat. 272 (codified in scattered sections of U.S.C.)

18. Scott J. Shapiro, *Law, Plans, and Practical Reason*, 8 *LEGAL THEORY* 387, 421 (2002).

were, by people who begin with some of the subplans and as they go along develop a sense of how they might mesh together in a larger project), which is what the emergence of common law doctrine is like.

But Shapiro also wants to say that the laws that issue from these planning processes have something in common with plans. Sometimes he says they are “*planlike* norms” (p. 120); he uses this term in particular to refer to customary norms which, he says, have evidently not been produced as plans though “they are highly planlike in nature” (p. 225). Other times he says that his intention is not to draw an analogy between laws and plans, but to insist that laws literally *are* plans.<sup>19</sup> There is no contradiction here. If all laws are plans then this will include the laws that structure our legislatures and courts. But it is sometimes harder to see how our understanding of particular laws—the upshots of legislative activity for example—is advanced by describing them as plans (or as *planlike*).

Consider, for example, a simple rule of criminal law: the prohibition on homicide. In what sense can we describe this as a plan? It certainly seems to be a norm, and that is the way it is usually understood in jurisprudence. It purports to guide our actions away from murder and manslaughter (assuming, of course, that we need guidance of this sort to supplement the guidance that morality already affords). So we have the law against killing. What element of planning, as opposed to simple normativity, does this straightforward prohibition embody? It can’t just be that we imagine our legislators saying: “Here’s the plan: there is to be no killing.” The notion of a plan here would be so vapid as to add little or nothing to the notion of a norm.

Three further possibilities suggest themselves. The first two pursue the point that what I am calling a straightforward prohibition is in reality not all that simple. First of all, the law regarding homicide is not normally expressed in the simple form of “Thou shalt not kill.” Usually its formulation is something like “Murder is defined as X and the penalty for murder shall be Y.” The formulation is still normative: it directs the authorities to impose some particular sanction, Y, on those who satisfy the definition, X, of murder. And it does seem more plausible and perhaps quite illuminating to characterize that by saying, “Here’s the plan: we will imprison the murderers for life.” Our society has plans for dealing with earthquakes and plans for dealing with inflation, and this is our plan for dealing with murder. On this account, Shapiro’s Planning Theory would take sides as between Hans Kelsen and H.L.A. Hart on how best to understand the essence of a law that specifies an offense or delict: according to Kelsen, the essence of such a law is the guidance it offers to officials about what to do in the case of certain behavior by a citizen (though the citizen is free, if he likes, to *infer* a prohibition governing his conduct from overhearing this instruction directed at officials), whereas according to Hart, the essence of such a law remains the primary guidance it is supposed to offer the ordinary citizens.<sup>20</sup> I don’t think

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19. See p. 119.

20. Compare HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 60–61 (Anders Wedburg trans., 1945), with HART, *supra* note 4, at 38–39.



Shapiro pursues this line or regards the Planning Theory as taking sides between Kelsen and Hart.

A second possibility—overlapping with the first—is that we pay attention to the complexity of real-world homicide laws, even in the norms they address to the citizen. The law of homicide says much more to the citizen than “Thou shalt not kill.” Quite apart from its immediate normative guidance and from the procedural and penal directives issued to officers of the state, the law of homicide lays down definitions, it couples mental elements with physical elements of the offense, it distinguishes degrees of homicide, it sets out defenses and excuses, it prescribes statutes of limitations, and it accumulates and organizes doctrine; it does all sorts of things—some of them technical, some of them not—to give this norm legal clothing that allows it to be administered as part of the complex apparatus of an effective and fair legal system. It provides general and detailed characterizations of the offending that it is concerned with. As John Finnis puts it, “[I]t is the business of the [legal] draftsman to specify, precisely, into which of these costumes and relationships an act of killing-under-such-and-such-circumstances fits.”<sup>21</sup> And Finnis adds, “That is why ‘No one may kill . . .’ is legally so defective a formulation.”<sup>22</sup> Once one acknowledges this complexity in a given prohibition, once we see that what we are calling a primary rule is really a much more complicated entity than just a simple norm, then it is perhaps easier to assimilate it to a plan. But there would have to be a little bit more said in order to make the analogy work and to make it helpful. For not every form of normative complexity discloses planning. A set of norms can be complex, but still remain stubbornly unilluminated by being described as a plan. I wish Shapiro had said more about this to justify his characterization.

We might elaborate on this by noting that there is widespread disagreement in society on each and every element that goes into a complex law of homicide. We disagree about self-defense and the duty to retreat; we disagree about the “battered spouse” defense; we disagree about the felony-murder rule; we disagree about the insanity defense; we disagree about the applications of doctrines like necessity in homicide cases; and we disagree about all sorts of procedural and penal elements. But on each and every one of these points, there is a social interest in our having and sharing a single framework of positions that adds up to a law of homicide that can stand in the name of us all, notwithstanding our disagreement. This sort of coordination in the face of disagreement is one of the functions that Shapiro attributes to plans—I shall say more about it in Part IV—and so, in this sense, one can identify a planning element in the primary rules about homicide.<sup>23</sup> They plan out a way for us through the tendentious tangle of controversies associated with homicide.

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21. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 283 (1980).

22. *Id.* (emphasis omitted).

23. Finnis also adopts a coordination approach to the functions of law. *See id.* at 231–33; *see also* JEREMY WALDRON, *LAW AND DISAGREEMENT* 105 (1999).

A third possibility is more prominent in Shapiro's account. A primary rule, which looks more like a norm than a plan, may nevertheless count as part of a plan when considered in its relation to a whole array of other norms. Shapiro's best example of this is traffic law:

Rules that require drivers to be a certain age, pass a test, inspect their cars every year, wear seat belts, buy liability insurance, stop at red lights, ride on the right side, and drive not over 55 mph or under the influence of alcohol are all part of a comprehensive regulatory regime. Their aim is to guide and organize the behavior of many different individuals so as to achieve a very complex and contentious goal, which is safe, fast, and fair driving, in an arbitrary environment. They do so by serving as paternalistic measures that compensate for cognitive incapacities, weakness of the will, and ignorance; coordination devices that render behavior more predictable; and ethically acceptable guidelines that ensure that motorists will not interfere with one another while simultaneously obviating the need to deliberate, negotiate, and bargain about what behavior is reasonable under the circumstances (p. 200).

Maybe we can regard even the laws defining criminal offenses in this holistic light. They hang together as an overall plan for managing our interactions and conflicts. As a society, we say, "Here's the plan: we are going to deal with conflict and anger without killing, fighting, etc." I find all three of these accounts attractive—if one leaves aside the Hart/Kelsen quarrel under the first heading about what the true essence of a prohibition is. And all three help us see why Shapiro's Planning Theory can cast some significant light on law.

#### IV. PLANS AND POSITIVISM

That we can find these elements of planning in law, not only at the level of secondary rules but also at the level of primary rules, means we have opened up an interesting analogy. Laws are like plans in these and no doubt in other respects. But what progress does this sponsor in jurisprudence? What conundrums in legal philosophy does this help us untangle? What positions in the traditional antitheses of jurisprudential controversy does the Planning Theory support?

Shapiro is a legal positivist and he thinks the Planning Theory supports positivism. After all, the existence or nonexistence of plans, in the sense that interests him, is a matter of social fact:

Whether I have a plan to go to the store today, or we have a plan to cook dinner together tonight, depends not on the desirability of these plans but simply on whether we have in fact adopted (and not yet rejected) them. In other words, positivism is trivially and uncontroversially true in the case of plans: the existence of a plan is one thing, its merits or demerits quite another. (p. 119)

Unfortunately, "plan positivism," as he calls it (p. 178), does not settle the issue between natural lawyers and legal positivists. It would if being a plan

or being planlike were all there was to being a law. But as we have seen, law or laws may also be other things (or like other things) besides. We noted that William Blackstone analogized laws both to rules laid down by civil authority and also to propositions of right and wrong: a law is "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."<sup>24</sup> Nothing can be a law for Blackstone if it is not a rule prescribed by the sovereign in a state, but that is a necessary, not a sufficient, condition. And the fact that the necessary condition is understood positivistically doesn't show that the other conditions for the existence of law have to be understood in that way. Laws are a subspecies of commanded rules, according to Blackstone, and the mark of the subspecies is a moral criterion. Even Aquinas's natural law theory had this shape.<sup>25</sup> There cannot be human law unless certain social facts obtain; but that certain social facts should be characterized as the existence of law depends on other things besides social facts, such as the rules (whose existence is a matter of fact) partaking of right reason. The same might be true in the case of the Planning Theory. Whether there is (whether we have) a plan or not is a matter of social fact; and if laws are plans (or like plans, in this regard), their existence is at least in part a matter of social fact. But it doesn't follow at all that the social facts associated with plans exhaust the existence conditions of law.

I think Shapiro is aware of this point, because he has a couple of additional claims to make that he thinks dispose of the natural lawyers' thesis that laws may be (by definition) plans-that-have-a-certain-moral-quality. The first claim is that the social functions performed by the sort of plans that laws and lawmaking involve preclude there being a moral test for laws' existence. Shapiro puts it this way:

Shared plans must be determined exclusively by social facts *if they are to fulfill their function*. . . . [S]hared plans are supposed to guide and coordinate behavior by resolving doubts and disagreements about how to act. If a plan with a particular content exists only when certain moral facts obtain, then it could not resolve doubts and disagreements about the right way of proceeding. For in order to apply it, the participants would have to engage in deliberation or bargaining that would recreate the problem that the plan aimed to solve. The logic of planning requires that plans be ascertainable by a method that does not resurrect the very questions that plans are designed to settle. Only social facts, not moral ones, can serve this function. (p. 177)

Shapiro is right that the function of positive law is often to settle an issue defined in moral terms, a contentious issue about which people disagree. Indeed he says in several places that this is the definitive aim of law: "[L]egal systems are enterprises for solving moral problems" (p. 358).

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24. BLACKSTONE, *supra* note 10, at \*44.

25. See AQUINAS, *supra* note 1.

Every community, modestly sized or larger, faces what he calls the circumstances of legality:

The circumstances of legality obtain whenever a community has numerous and serious moral problems whose solutions are complex, contentious or arbitrary. In such instances, the benefits of planning will be great, but so will the costs and risks associated with nonlegal forms of ordering behavior, such as improvisation . . . communal consensus, or personalized hierarchies. Indeed, the costs and risks of nonlegal planning may be so large as to be prohibitive.<sup>26</sup>

The “fundamental aim” of law, says Shapiro, is to remedy the moral deficiencies of the circumstances of legality. “[L]egal systems are agile, durable, and capable of reducing planning costs to such a degree that social problems can be solved in an efficient manner” (p. 172).

The aim, then, in every area in which we face the circumstances of legality, is to provide a plan that can get us past disagreement to a point where we are able to orient our action to a common project or a common framework in spite of our moral differences. For example, we disagree about the proper extent of health care provision for the poor: some think that all the health needs of the poor should be taken care of by the state in a sort of British-style National Health Service (“NHS”); others think that the poor like everyone else should buy health services in the marketplace (apart from dire emergencies) and that they should be empowered to do so by schemes that set them to work for a living wage. The partisans of these proposed plans are bitter rivals, each regarding the other’s scheme as unjust. But unless we settle on one plan or other, perhaps nothing will be done for the poor. So we have to settle on one of them as *the* plan to be adopted for our society, using the all-purpose planning mechanisms that Shapiro identifies with secondary legal rules. We cannot do this unless the plan that is adopted is identifiable in nonmoral terms. If something’s being the indigent health-care plan for our society depends (even among other things) on its moral quality, then the partisans of the rival plans will identify different and incompatible schemes as the indigent health-care plan for our society. And as a result, planning in this area will not coordinate their activities as it is supposed to.

This is a fine argument as far as it goes. Its implication is that insistence on a moral criterion for something’s counting as “law” will often interfere with and undermine whatever planning functions law is supposed to be performing in the circumstances of moral disagreement. As a disputable honorific, the application of the term “law” will raise some of the very issues—the moral issues—that the thing whose status we are arguing about is supposed to settle. If nothing is law unless it is just, then people who disagree about justice won’t ever be able to agree on what the law is (even though one of the prime functions of law is to establish plans in the face of disagreement). It is an example of what I have called elsewhere “normative

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26. P. 170. By “arbitrary,” Shapiro is referring to moral problems that have the character that any arbitrarily chosen solution from a given range of solutions is better than none, provided all people follow it. The rule of the road is a good example.

positivism.”<sup>27</sup> One begins from a normative account of law’s mission. (Positivists who deny that we can give such an account of law’s mission are “mistaken,” says Shapiro (p. 391).) And then one argues that that mission cannot be performed unless rules, commands, norms, edicts, or plans are recognized as law by nonmoral criteria. In other words, one begins from something very like a natural law criterion for law but then one argues that that criterion requires that laws be identifiable as such in a positivistic way.<sup>28</sup>

However, it is unclear how far this can be taken as an argument against using a natural-law criterion to distinguish plans that count as law from plans that do not. There are many moral predicates that might be implicated in a natural-law definition of law and there are many moral predicates that might be implicated in the dispute that lawmaking in a particular area tries to settle. If different sets of moral predicates are at work in these two contexts, then the problem that Shapiro identifies may not arise. Suppose we say that it is part of the definition of “law” that a law must be, on its face, evenhanded and that nothing can count as law if it is grossly partial to one segment of the community against others; and suppose we then set out to make law (to make a plan that will have the status of law among us) in order to settle the question of indigent health care among the partisans of rival proposals—for example, the NHS-style proposal and the workfare proposal mentioned a moment ago. The partisans of the proposals disagree about the merits of the two plans; each thinks the other’s plan is undesirable and perhaps unfair. But *that* moral disagreement need not be equated with possible disagreements about the application of the moral criteria supposedly associated with the word “law” itself. It is possible that each partisan may agree that the other’s plan is not grossly partial to one segment of the community; so each may agree that the other’s plan, if adopted, could count as law according to the natural law definition. “Law” would still be a moralized term, applying to some possible plans but not others; but it wouldn’t necessarily resurrect the very moral disputes that a plan was intended to settle in the first place.

We could even use Shapiro’s own conception of law’s fundamental mission to make this point. Suppose we say, in a natural-law spirit, that nothing counts as law unless it purports to make a moral contribution to society by addressing the circumstances of legality in some area. No doubt we will quarrel about which laws satisfy this criterion: some manifestly self-serving decisions by greedy legislators will constitute clear cases of nonlegal plans; other examples will be controversial. But those controversies need not be identical with the controversies that a given plan purports to solve in the event that it is addressing the circumstances of legality in some area. They may be identical in some cases, but they need not be. So Shapiro’s first ar-

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27. See Jeremy Waldron, *Normative (or Ethical) Positivism*, in HART’S POSTSCRIPT, *supra* note 9, at 411.

28. See also GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 328 (Tony Honoré & Joseph Raz eds., 1986).

gument against having a moralized definition of “law” does not necessarily go through.

I think, by the way, that something similar can be said about Shapiro’s argument for exclusive legal positivism in Chapter Nine of *Legality* (pp. 271–77). To put it very crudely, exclusive legal positivists hold not only that there cannot be moral criteria for the identification of law, but also that there cannot be moral criteria for its application either. Some traffic laws seem to be incompatible with this. Ohio used to have this provision in section 12603 of its traffic code:

Whoever operates a motor vehicle or motorcycle on the public roads or highways at a speed greater than is reasonable or proper, having regard for width, traffic, use and the general and usual rules of such road or highway, or so as to endanger the property, life or limb of any person, shall be fined not more than twenty-five dollars.<sup>29</sup>

To apply this to a given case, one would have to figure out for oneself what speed is reasonable and proper for the road one was driving on. But people disagree about that and it is surely the task of traffic law to settle such disagreements by providing (e.g.) numerical speed limits. The application of section 12603 seems to raise the very issues that we would hope a plan in this area would settle. So we might want to say that section 12603 is not really a genuine plan and hence not really a genuine law; it is an inchoate plan; and it will only become a proper plan, and hence a proper law, once courts have filled in some determinate values for “reasonable” and “proper.” After all, as Shapiro puts it, “The existence and content of a plan cannot be determined by facts whose existence the plan aims to settle” (p. 275). But once again the argument moves too quickly. The aim of section 12603 may not be to direct the speed at which we drive—it may be thought that conditions vary too much to enable a determinate number to be set<sup>30</sup>—but to direct our exercise of moral judgment. Some people think it is appropriate to

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29. This is my example, not Shapiro’s. The provision is cited in *State v. Schaeffer*, 117 N.E. 220, 222 (Ohio 1917). See Jeremy Waldron, *Vagueness and the Guidance of Action*, in *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW* (Andrei Marmor & Scott Soames eds., forthcoming 2011).

30. As the court said in *Schaeffer*:

The Legislature . . . in this instance, saw fit to fix no definite rate of speed for the car . . . . Some statutes have undertaken to fix a rate of speed which would be *prima facie* dangerous, but a rate of speed dangerous in one situation would be quite safe in another situation, and if the rate of speed were definitely fixed, naturally it would have to be the minimum speed at which cars might be safely driven, because that speed would have to be a safeguard against every possible situation which would be perilous even at a speed of six or eight miles an hour. There is no place in all the public [roads] where a situation is not constantly changing from comparatively no traffic to a most congested traffic; from no foot travelers to a throng of them; from open and clear intersections, private drives, and street crossings, to those that are crowded; from free and unobstructed streets to streets filled with crowds of foot travelers and others getting off and on street cars and other vehicles. In order to meet these varying situations, and impose upon the automobilist [sic] the duty of anticipating them and guarding against the dangers that arise out of them, this statute was evidently passed in the interests of the public safety in a public highway.

117 N.E. at 225–26.

jump into an automobile and drive off without even considering what a reasonable speed would be; others think it is important to figure this out before one puts the car in gear. Section 12603 settles that dispute: in effect, it directs the use of moral judgment in circumstances where it might not otherwise be engaged. If it is a plan, it is a plan for moral thinking—because that, as much as behavior of various kinds, is one of the things we need to plan for. Left to themselves some people will reflect on what a reasonable speed is given the condition and width of the road, and others will not. This is too risky; so the plan is that everyone must drive at a reasonable speed taking into account width, condition, etc.; and to comply with or play their part in this plan, drivers are going to have to address themselves to this issue of reasonableness.

The example shows that even when moral predicates are used, their use does not always beg the moral question that the law is supposed to settle. And so we are back with the general response to Shapiro's first argument: a moral criterion for identifying law or for identifying what a given law requires does not necessarily defeat the purpose of having a law in the first place.

## V. THE RULE OF LAW

Shapiro's second response to the possibility that there might be moral criteria to distinguish plans that are laws from plans that are not is a more disarming response than the one we have just considered. But I think it is also misguided. Let me explain.

Some jurists have argued that commands or rules or plans count as laws only if, in their form and in the procedures associated with them, they respect the dignity and freedom of those to whom they apply. Lon Fuller, for example, identifies a number of formal characteristics that laws must have in order to respect the dignity of free persons. They must be prospective, stable, public, clear, practicable, and consistent with the other laws that also apply to the same people.<sup>31</sup> Fuller's position is that every departure from these principles in the form that is taken by the rules or plans that are used in governance "is an affront to man's dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey to him your indifference to his powers of self-determination."<sup>32</sup> And a gross departure from them "does not simply result in a bad system of law; it results in something that is not properly called a legal system at all."<sup>33</sup> (Others have taken a similar line so far as the procedural aspects of law are concerned.<sup>34</sup>) So once again, even if one ac-

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31. LON L. FULLER, *THE MORALITY OF LAW* 41 (rev. ed. 1964).

32. *Id.* at 162.

33. *Id.* at 39.

34. See Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 5–10, 55–60 (2008); Jeremy Waldron, *The Rule of Law and the Importance of Procedure* 13–14 (N.Y. Univ. Sch. of Law, Pub. Law Research Paper No. 10-73, 2010), available at <http://ssrn.com/abstract=1688491>.

cepts Shapiro's assimilation of laws to plans, one might still (as Fuller does) reserve the term "law" for plans that in their formal or procedural aspects are not gross affronts to human dignity. No doubt people sometimes disagree about which laws are gross affronts to this kind to human dignity, but that disagreement is not of the kind that laws are designed to settle. We may disagree about the fairness of the rival schemes for indigent health care without disagreeing about whether in their formal and procedural aspects those schemes count as gross dignitarian affronts.

The title of Shapiro's book is "Legality," and that is a term that is often used in association with the position I have just outlined. Fuller sometimes referred to his eight principles about prospectivity, stability, publicity, and so forth (and their dignitarian implications), as "principles of legality."<sup>35</sup> Hart also used that term for them, though he certainly did not follow Fuller all the way in the argument I have been outlining.<sup>36</sup> Often, too, we use "legality" to distinguish modes of governance that count as the rule of law from managerial governance or other forms of overtly manipulative, coercive, arbitrary, or disrespectful rule. Indeed there is a certain irony in Shapiro's association of "legality" with planning because many people regard social planning as more or less the opposite of legality. In the work of F.A. Hayek, for example, these are polar opposites: a Soviet-style commitment to social planning is the very antithesis of the rule of law.<sup>37</sup>

Shapiro addresses this issue, pointing out quite rightly that there is no reason why the "notorious large-scale public projects" of people like Stalin and Mao "should be taken to represent and thus discredit the practice of social planning in general" (p. 154). Social plans need not represent vast, all-consuming, centralized initiatives that direct and control the totality of economic activity in a society. A free market economy is *planned* in the sense that a framework is laid out through the laws of contracts, property, finance, securities, corporations, etc., to coordinate the activities of vast numbers of people. But that sort of planning is in principle compatible with the rule of law—indeed Hayek would say it actually requires the rule of law. His position is that "in the usual sense of purpose, namely the anticipation of a particular, foreseeable event, the law indeed does not serve any purpose but countless different purposes of different individuals."<sup>38</sup> So in that sense, the law is not a giant plan, but a giant facility for individual plans. But as Shapiro notes, planning can include "[p]lanning for [s]pontaneous [o]rder" (p. 160). And here, I think, he can agree with Hayek that law is a "multi-purpose instrument[],"<sup>39</sup> a plan for freedom, a plan for the coordination and

35. FULLER, *supra* note 31, at 41.

36. See H.L.A. HART, LAW, LIBERTY AND MORALITY 12 (1963); H.L.A. Hart, *Problems of Philosophy of Law*, in 5 THE ENCYCLOPEDIA OF PHILOSOPHY 264, 273–74 (Paul Edwards ed., 1967); see also Jeremy Waldron, *Positivism and Legality: Hart's Equivocal Response to Fuller*, 83 N.Y.U. L. REV. 1135, 1144–47 (2008).

37. See FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 55 (1944).

38. 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 112–13 (1983).

39. *Id.* at 113.



regulation of all the millions of plans that individuals have in a way that reduces conflict and embodies freedom. I don't mean that Shapiro is a Hayekian in his own political view of law's substantive ends. He is open on that; I don't think he accepts Hayek's view that some substantive ends are incompatible with the rule of law. But he is happy to accept the Hayekian position that the repudiation of Soviet-style planning does not mean that a free society and a free economy can come into existence spontaneously without the sort of organized structure that legal frameworks and legal planning requires. He cites Hayek for the proposition that even if "'the holder of coercive power . . . confine[s] himself in general to creating conditions under which the knowledge and initiative of individuals is given the best scope so that they can plan most successfully,'" still the holder of coercive power (the state) has to plan even to do that much.<sup>40</sup>

Not only does Shapiro make the case that his affection for planning is consistent with a Hayekian affection for legality, he also accepts a large part of the argument I attributed at the beginning of this Part to Fuller—the argument that makes the principles of legality part of the criteria for identifying a social plan as law. As I said, his response is a disarming one. Fuller's principles, he says, "state necessary conditions for the existence of social planning" (p. 395), and "regimes that flout these principles are simply not engaged in the basic activity of law" (p. 394). After all, how can you have a plan that is not prospective or contradictory or unclear or changing so quickly that no one can adjust their behavior to it? How can a plan be social if it is secret or if it is not general in its formulations?

Shapiro's position therefore is that we can get to Fuller's principles just by reflecting positivistically on the sort of thing law is. "The positivist . . . can agree with Fuller that observance of his eight principles is necessary for the existence of a legal system and yet deny that the existence of law depends on moral facts" (p. 395). According to Shapiro, we don't come to Fuller's principles by reflecting on what mode of governance is necessary to respect human dignity—rejecting as nonlaw modes of governance that do not have that moral orientation. We come to it by reflecting on governance itself, and in particular its planning aspect. Shapiro does not deny that governance that satisfies these principles is, for that reason, valuable. But the value is simply the value of having social plans at all. We face numerous and serious complex moral problems, and we need plans to deal with them—that is, to guide, coordinate, and monitor our actions: "If a regime did not normally produce standards that were general, promulgated, clear, prospective, consistent, satisfiable, and stable . . . it would not provide the guidance, coordination, and monitoring we need to solve the problems we ought to solve" (p. 396).

But suppose Shapiro is wrong in the assumption he makes that effective planning for a society is necessarily general, prospective, stable, etc. We know that managerial planning of large firms is not like that. The plans are usually not general; they solve particular problems of production or person-

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40. P. 155 (quoting HAYEK, *supra* note 37, at 35) (emphasis omitted).

nel on an ad hoc basis; they change from day to day or week to week, depending on various conditions, and they are not guided in that changeability by any general promulgated principles; some of these plans are communicated to all those who are affected by them; some are kept secret; some are passed on to managers and allowed to trickle down to the assembly line; some orders are issued not on the assumption that they are practicable but in order to test the limits of what is practicable; and so on. The same is true for military planning, both at the staff level and down the chain of command. So large-scale planning is sometimes non-Fullerian; sometimes it does not look like the rule of what we would call *law*.

The same is true also for the management of whole societies. Fuller conceded that even large parts of the management of our own modern economy have to be like that: legalistic forms and particularly legal procedures may be quite inappropriate in the area of economic allocation in a mixed economy.<sup>41</sup> And some totalitarian societies, where planning reaches its epitome, have not proceeded on the basis of anything like a coherent set of general principles communicated publicly in advance; they have governed often through a combination of terror and the manipulation of ignorance in order to achieve desired results. This is a way of ruling and it is a way of planning. But many jurists, following Fuller, would say that this is not legal planning and this mode of governance is not the rule of law.

So there are different ways of planning. Not everything that fails the test of Fuller's principles ceases to be a plan or ceases to be an effective plan. If nevertheless we insist on the importance of legality, we do so not on account of its effectiveness but because we value the *sort* of ruling or planning that it makes possible. As we saw earlier, Fuller says that we value this sort of ruling in part because of the way it respects human dignity; others, like Hayek, say we value it for its constitution of an environment conducive to freedom.<sup>42</sup> The point is that we use the word "law"—and not just the word but the whole apparatus of legality and the heritage of our thinking about the distinctiveness of law's forms, law's procedures, and law's commitments—to mark this discrimination among forms of ruling and the values on which this discrimination is based. It is a complex apparatus and heritage, and—despite the depth and power of Shapiro's insights—I fear it cannot be reductively accounted for by simply unpacking the concept of a plan.

## VI. INTERPRETATION AND HISTORY

There are lots of riches in Scott Shapiro's book that I have been unable to discuss in this Review. I have concentrated on the analogy between laws and plans (or the assimilation of laws to plans) and on the lessons that Shapiro attempts to draw from that analogy (or assimilation). In doing that, I have not been able to convey how well this book is written or how much light the author is able to shed along the way on various issues in the

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41. See FULLER, *supra* note 31, at 170–77.

42. See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 133–61 (1960).

philosophy of law. However, it would be wrong to end without noticing one interesting position defended by Shapiro that, in my view, stands a little apart from the main line of argument in *Legality*. It concerns Ronald Dworkin and the role of judges.

Dworkin holds the view that judges have to engage in Herculean exercises of moral judgment and moral theorizing in order to make sense of the law.<sup>43</sup> Faced with a hard case involving the application of a difficult piece of constitutional text or doctrine, Dworkin's judge tries to construe the whole body of existing law in the best light he can, and he draws his decision for the case in front of him from that construction. If the constitutional text uses moral terminology like "cruel" or "unreasonable," Dworkin's judge reads that as an instruction to develop his own best account of cruelty and unreasonableness and to decide the cases in front of him in the light of that.<sup>44</sup> If it requires "equal protection" or "due process of law," he takes those provisions and all the cases in which they have been applied and tries to make moral sense out of that whole shebang in order to decide some case about abortion or affirmative action, for example, that has turned up on his docket. And in all of this, the Dworkinian judge works more or less as a moral philosopher, not in the sense of indulging his own subjective values, but trying to figure out the objectively best account that can be given of all the concepts, values, and ideas that the law instructs him to consider. It means that Dworkinian adjudication is a tremendously ambitious undertaking and one that can never be separated from deep reflection on social values and first principles.

Shapiro is pretty firmly opposed to all of this. Partly it is for reasons we explored in Part V. He thinks that Dworkin's judge is being instructed to open up and unsettle the very moral issues that it was the point of having a constitution (a constitutional plan) to settle (p. 311). Shapiro doesn't quite explain what a judge *is* supposed to do when the allegedly settled plan uses terms like "unreasonable" (in the Fourth Amendment) or "cruel" and "excessive" (in the Eighth Amendment), or entirely abstract ideas like "equal protection" and "due process" (in the Fourteenth Amendment). He excuses himself from that task, telling us simply that the Planning Theory explains why these are difficult questions (p. 385) and implying that whatever the right strategy of interpretation is (originalist, textualist, purposivist), it certainly can't be Dworkinian.

The main reason it can't be Dworkinian, he says, is that neither the framers of the Constitution nor the American people trust judges to engage in the sort of enterprise that Dworkin recommends. What he calls "[t]he birth story of the American republic" (p. 313) discloses a tremendous amount of distrust and suspicion of the very attributes of moral judgment and moral theorizing that officials—particularly judges—would have to engage in if they were to follow Dworkin's advice. Shapiro's arguments here involve a curious shift from the highly abstract general jurisprudence that pervades

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43. See generally RONALD DWORKIN, *LAW'S EMPIRE* 225–75 (1986).

44. See RONALD DWORKIN, *JUSTICE IN ROBES* 120–21 (2006).

the rest of the book to something quite peculiarly American. Though he acknowledges he is “[o]bviously” no historian (p. 313), he presents twelve pages of history (pp. 313–24), populated with Federalists, Tories, and, above all, radical Whigs, to show that “[t]he degree of analysis and discretion that Dworkin’s account demands would have undoubtedly struck these Whigs as unreasonable” (p. 325). The Whigs didn’t think that people possessed “the competence necessary to engage in a philosophical investigation into the moral vindication” of the legal regime (p. 325). “[T]hey did not regard the political community as trustworthy and unified enough to rationalize so difficult, creative, and value-laden a procedure” (p. 327). And Shapiro does not think that modern Americans are any less distrustful:

Because so many of the core rules of American constitutional law rest on principles of abiding distrust toward individuals with power, the importance of checking discretion, and the fact of pluralism, any conception of law that requires for its implementation a great deal of philosophical competence, moral rectitude, and political homogeneity will clash irredeemably with such a legal structure. (p. 329)

It is an odd and frustrating passage, but it is difficult to resist the impression that Shapiro is on to something. When judges or jurists reflect upon interpretive strategy—i.e., on the strategy that is most appropriate for them to adopt when they are considering the application of a difficult piece of text or doctrine—they should consider not just how to reach the best result (by their lights), but on their own place in what Shapiro calls the system’s “economy of trust” (p. 331). To the extent that they discern their own position as a *distrusted* position, they should veer away from strategies that give great weight to the distinctiveness of their own thinking or their own apprehensions of social value, and perhaps they should move towards strategies that give greater weight to values or modes of thinking that are already well established in society. So, for example, instead of asking which punishments are cruel by my own lights, as a judge I should ask which punishments are cruel by socially-established standards of cruelty. The second question may still be difficult to answer, and answering it will still be an enterprise in which *I* have to make *my own* best efforts; but it might be more plausible to say that I have been entrusted to ask and answer this question than to say that I have been entrusted to ask and answer questions of moral philosophy.

Shapiro thinks that the idea of planning casts light on all this, and I think he is right. (Indeed, I think his argument is on firmer—as well as jurisprudentially more interesting—ground when he connects distrust to the idea of a plan than when he connects it to the views of radical Whigs in the 1780s.) Plans, says Shapiro, are “sophisticated devices for managing trust and distrust” (p. 334). We adopt plans in the circumstances of legality often because we have misgivings about trusting some people or sometimes trusting any people to sort out social and moral problems in an uncoordinated way. This is true about the explicit assignment of roles in (say) a statutory scheme:

Legislators are supposed to identify those who are trustworthy and assign them tasks that take advantage of their trustworthiness; conversely, they are to identify those who are less reliable, plan out their behavior in greater detail, and deny them the ability to abuse or exploit their power. . . . The task of institutional design, therefore, is to capitalize on trust while simultaneously compensating for distrust . . . (p. 338)

And it must equally be true about our adoption of interpretive methodologies. We must approach interpretation self-consciously in a way that keeps faith with the fact that it is a *plan* we are expounding, not a moral enterprise of our own.

At the end of the book, Shapiro sums all this up by eulogizing the virtues of interpretation “inside the box” (p. 398), where the “the box” refers to the overall plan that the interpreter is dealing with:

The Rule of Law flourishes . . . only when legal interpreters possess a great deal of self-discipline. They must . . . resist the impulse to take legal interpretation as an invitation to philosophize about the great moral and political questions of their time. . . . To be able to think *inside* the box . . . is the ultimate passive virtue of the legal interpreter. (p. 398)

I tried to show at the end of Part IV that it doesn’t follow that “they must suspend their moral judgment” (p. 398), for the plan may sometimes be that a moral judgment is to be made by someone attempting to apply the law at just this point. Shapiro is always in danger of exaggerating how much one can draw from the proposition that the logic of planning is respected only when the process of interpretation does not unsettle those questions that the law aims to settle. But his discussion of all this is tremendously suggestive, and like the rest of the book it shows that the idea of planning can indeed cast light on the problems of jurisprudence without necessarily blinding us to other analogies and other sources of insight.